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## Book Reviews

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# Book Reviews

**ACQUITTED OF MURDER.** By William Seagle. Chicago: Henry Regnery Company, 1958. Pp. 257. \$5.00.

This interesting book is authored by an erudite lawyer who by three prior legal publications<sup>1</sup> has been shown to be a gifted writer as is also shown in the present publication. It contains seven brilliantly narrated tales of murder and their trials.<sup>2</sup> In each of them there was a conviction on the basis of a jury verdict finding the defendant or defendants guilty of murder, but the conviction was set aside by the appellate court on one of those grounds which Mr. Seagle classifies as "legal technicality."<sup>3</sup> On retrial, there was either a verdict of not guilty, or a second verdict of guilty which, however, was also, on a similar "legal technicality" ground, set aside on appeal. There was never a final conviction although, according to Mr. Seagle, in each case the guilt of the accused was proved beyond any reasonable doubt.<sup>4</sup> Thus the defendant, or defendants, got away with murder; except that in one case, the lucky winner in the judicial lottery was subsequently put to death by the lynching action of an enraged mob,<sup>5</sup> and in two other cases he was subsequently convicted of another capital crime and executed therefor. One case, however, is singled out by the fact that the opportunity for the "legal technicality" indulged in by the appellate court was created by a statute enacted after the trial

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1. *LAW: THE SCIENCE OF INEFFICIENCY* (1952); *MEN OF LAW: FROM HAMMURABI TO HOLMES* (1947); *THE QUEST FOR LAW* (1941) (reprinted as the *HISTORY OF THE LAW* (1946)).

2. Entitled as follows: "The Case of the Capital Quibble," "The Case of the Man of Two Lives," "The Case of the Susceptible Solons," "The Case of the Heavenly Bride," "The Case of the Border Shooting," "The Case of the Man Who Hunted Democrats," and "The Case of the Death House Mike."

3. "Many of these so-called 'technicalities' turn out on close examination to be substantial and reasonable and to consist of the application of rules which, while they do not always work well, are generally calculated to promote justice and to protect interests that need protection." *DESMOND, SHARP QUILLETTS OF THE LAW* 144 (1949). See also Mr. Justice Douglas' statement, in his foreword to *JEROME AND BARBARA FRANK, NOT GUILTY* 11 (1957), that "Constitutional guarantees which ensure a fair trial are not slick lawyers' tricks by which known criminals are set free"; and the following observation by *LUSTGARTEN, THE MURDER AND THE TRIAL* 134 (1958). "Our legal system is designed to shield the innocent; start making exceptions and the shield turns into straw."

4. The reviewer is not sure whether this was so in the case of the "Man Who Hunted Democrats." It seems that in view of the circumstances related by Mr. Seagle that defendant might have been guilty, or have been proved to have been guilty, only of manslaughter.

5. For a strange observation on "lynch law" as exceptionally understandable in case of an acquittal travestying justice, see *LUSTGARTEN, THE WOMAN IN THE CASE* 151 (1955).

of the defendant. It changed the manner of execution of a death sentence, and repealed the previous law governing such execution. This induced the appellate court into the belief that the death sentence pronounced at a time when the prior law was still in effect had by the new statute been deprived of the legal possibility of being carried out. The judgment was set aside with directions for a new trial; on retrial the jury found the defendant not guilty.<sup>6</sup>

Only in two of the seven stories, both involving criminals of the female species, did a situation of an amorous nature form the background of the murderous deed. In one instance a husband was poisoned to death by his wife, who wanted to eliminate him since she had a love affair with a younger and more attractive man. The other female defendant had for a long period of time been the mistress of a famous attorney. When he denied her request to marry her and for this purpose to divorce his legitimate wife, she lay in ambush and shot him to death.

In one case, the defendant was tried five times but never finally convicted. The verdicts of guilty reached in the first and the fourth trials were reversed on the grounds, respectively, of improper refusal of substantial evidence offered by the defense and incorrect instruction given to the jury. The second and the third trial resulted in a "hung jury," and the fifth attempt of the prosecution to bring about a conviction of the defendant was frustrated by the fact that the judge granted a motion of defense counsel to declare a mistrial on the ground of allegedly prejudicial evidence, which, however, in the four previous trials had been admitted without any objection by the defense. In another case, the ground of reversal was that, contrary to statute, part of the members of the jury had, during a recess, separated from the other jurors. In still another case, the reversal was based on two grounds, one of them a not unusual one, namely, violation of the character rule of evidence; the other one, however, a most startling one, namely, that the rule of practice prescribing the order of the arguments, as between prosecution and defense, had been violated.

More serious was the ground of reversal in the case of a man who, under highly suspicious circumstances, had led away his wife and girl child, both of whom were never seen or heard of any more, and who in the light of most forceful circumstantial evidence had murdered them. However, their bodies had never been found and, as part of his denial of the charge, he stressed the possibility of their being alive. The prosecution, initially believing that there was no sufficient proof of their death, charged him first only with the crime of "abduction" of his wife; he was convicted of this crime and sentenced to a term of imprisonment which he served. When stronger, though again only circumstantial, evidence had been discovered, the prohibition of double jeopardy was held to prevent his being de novo convicted for the murder of his wife. Double jeopardy did not, however, preclude his being de novo tried and convicted for the murder of his child, who had not been included as a victim in the abduction charge. However, this conviction

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6. While Mr. Seagle describes, but does not cite the cases recited by him, this case is cited as *Hartung v. People*, 22 N.Y. 95 (1860), *second appeal*, 26 N.Y. 167 (1863), by DESMOND, *op. cit. supra* note 3, at 16-18; it is referred to under the heading "The Convicted Murderess Who Was Freed by the Legislature."

was set aside by the appellate court on the ground that there was no sufficient proof of the *corpus delicti*, that is, of the fact that the girl had actually been killed, since her body had never been found and the circumstances pointing toward homicide were not so corroborated as to satisfy the *corpus delicti* rule of evidence. Since this was at least arguable, the case is an anticlimax as compared with all, or at least most, of the others, although also in this case a murderer, and a very vicious one at that, owed to a rule of law the possibility of getting away with a most heinous crime.

Highly startling, however, from a legal point of view, and in this respect probably the climax among the seven cases, is "The Case of the Border Shooting." If it had not actually happened, it could not have been better invented for the purpose of presenting a fictional parody of the administration of criminal justice. In the vicinity of the borderline between North Carolina and Tennessee a murder was committed by two men lying in ambush on the North Carolina side and from there shooting at a man who, approaching from the Tennessee side, was still on that side when the deadly bullets put a premature end to his life. They were, by a North Carolina jury, found guilty of the murder and accordingly convicted and sentenced. However, the conviction was set aside on appeal on the ground that North Carolina had no jurisdiction to try the case because the homicide was committed in Tennessee, though by defendants located in North Carolina. The appellate court thus deviated from the general rule that in such a case there is concurrent jurisdiction. This, however, is not the end of the curiosity in that case. When Tennessee demanded the extradition of the perpetrators to try them for that interstate murder, the same appellate court, although this time only by a majority vote, denied extradition on the ground that the culprits were not fugitives from Tennessee justice.

The seven murder cases and trials took place in various states of this country and present an interesting collection, indeed, of judicial freaks. It should be mentioned, however, that none of them is of recent date, but that each of them has been dug up from the past, the date of the oldest one being 1806, one having happened in 1871, one in 1900-1903, and the latest one in 1931-1939.

What is Mr. Seagle's message, conveyed in an introduction and an epilogue and purported to be illustrated by those case histories? Outside of such incidental matters as his criticism of the civil rights decisions of the United States Supreme Court<sup>7</sup> and of the *Durham* test<sup>8</sup> of legal insanity, he offers two propositions, one by expressly stating it, and one by an implication which clearly runs through his book and strongly colors it. To begin with the one expressly stated, it amounts in substance to this: Courts of appeal in this country have in the past promoted, and continue to promote, miscarriage of justice by failure to punish guilty murderers, because those courts have always been and are still addicted to "legal technicalities" instead of having an eye for the merits of the case presented to

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7. For a brilliant vindication of those decisions by a former President of the California State Bar, see Ball, *Civil Liberties*, 34 CALIF. STATE B.J. 420 (1959).

8. *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954), radically deviating from the right and wrong test of the *M'Naghten* rules, 8 Eng. Rep. 718 (1843).

them, and because they have given and continue to give that addiction a pernicious vent by their habit of reversing a conviction whenever there was a mistake in the trial court, whether going to the question of guilt or that of fairness of trial. He is far from admitting that the cases narrated by him were exceptional, but claims that they were typical at the times when they occurred and are also representative of what happens today in our courts of appeal sitting in murder cases.

This assertion, it appears, is incorrect in so far as the present practice of our courts of appeal is concerned, although in some instances of violation of constitutional guarantees, the United States Supreme Court has gone very far in maintaining the principles that under our system of law safeguard a person accused of crime, irrespective of whether he is guilty or innocent. However formalistic and over-technical the practice of appellate courts may have been in the past, and however much such courts, in bygone days, may have sinned in the sense charged by Mr. Seagle, it does not seem that our generation witnesses a general recurrence of that unsatisfactory practice. Indeed, it seems clear that today courts of appeal in this country, generally and also in murder cases, act in accordance with the principle which is thus expressed in the Constitution of California: "No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."<sup>9</sup> Only in such an exceptional jurisdiction where this principle should, even today, not be followed, could, and should, Mr. Seagle's book serve as a warning lesson. In the light of the practice, if not universally, at least generally followed, our present day courts of appeal do not create a judicial escape paradise for those justly convicted of murder. To believe anything else is to picture a devil which actually does not exist.

With respect to the other proposition, Mr. Seagle challenges the correctness of the traditional saying that it is worse that one innocent person be convicted than that ten guilty ones are acquitted, or, as Benjamin Franklin put it, "that it is better a hundred guilty persons should escape than that one innocent person should suffer."<sup>10</sup> He does not have much appreciation for those who have issued warnings against the possibility of conviction of innocents<sup>11</sup> inherent as a "judicial accident

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9. CAL. CONST. art. VI, § 4½.

10. Letter from Benjamin Franklin to Benjamin Vaughn, March 14, 1785, KOESTLER, REFLECTIONS ON HANGING 106 (1957). The traditional reference to the 10 to 1 ratio is retained in the following passage of Mr. Justice Douglas' foreword to JEROME AND BARBARA FRANK, *op. cit. supra* note 3: "We believe that it is better for ten guilty people to be set free than for one innocent man to be unjustly imprisoned."

11. BORCHARD, CONVICTING OF THE INNOCENT (1932); JEROME AND BARBARA FRANK, NOT GUILTY (1957). For German books that were prior in dates of publication to Borchard's classic, see ALSBERG, JUSTIZIRRTUM UND WIEDERAUFNAHME (1913); HELLWIG, JUSTIZIRRTUEMER (1914); KATCHER, SCHULDLOS VERURTEILT (1897); LOEFFLER, DIE JUSTIZMORDE DER NEUZEIT ALLER LAENDER (1867); the same work in second edition, but under changed title, LOEFFLER, DIE OFFER MAN-

risk" even in a bona fide and reasonably devised system of administration of criminal justice.<sup>12</sup> Instead, he suggests that our primary attention should be to the danger that, because of our judicial system and the protection with which it surrounds a defendant, many more guilty murderers escape punishment than innocents are convicted of murder. It appears that this is a totally unsound approach since it tends to undermine one of the fundamentals of our ideal of justice. Only when judicial error is instrumental in the conviction of an innocent should it be considered as a catastrophic incident. Our system of administering criminal justice is rightly designed with the idea to protect the innocent defendant even at the risk of creating a possibility of escape for the guilty one, and to prevent, so far as humanly possible, an innocent defendant's conviction.

While this writer strongly disagrees with the tendency of the present book, it is not claimed that our system of administration of criminal justice is so ideal as to need no reform.<sup>13</sup> At least in so far as the exclusionary rules of evidence are concerned, this would certainly be an unrealistic claim.<sup>14</sup> And among other things

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GELHAFTER JUSTIZ (1937); SELLO, IRRTUEMER DER STRAFJUSTIZ (1911). See also the following books for interesting incidental studies of the phenomenon of conviction of innocents and its causes: KOESTLER, REFLECTIONS ON HANGING 105-34 (1957), WILLIAMS, THE PROOF OF GUILT 103-07 (2d ed. 1958). Finally, a most striking, but rarely mentioned, case of conviction of an innocent on the basis of mistaken identification testimony, due to extraordinary similarity between the convicted man and the actual murderer, the case of Thomas Berdue, California, 1853, is related in BATES, HISTORY OF THE BENCH AND BAR OF CALIFORNIA 30-36 (1912).

12. Koessler, *Fallibility of Testimony and Judicial Accident Risk*, 4 CRIM. L. REV. (N.Y.) 56-66 (1957).

13. See Mr. Justice Frankfurter's statement that "no informed person can be other than unhappy about the serious defects of present-day American justice," in his dissenting opinion in *Leland v. Oregon*, 343 U.S. 790 (1952); and the observation by the late Jerome Frank in *JEROME AND BARBARA FRANK, NOT GUILTY* 38 (1957), that "on the other hand, there exist needless legal loopholes through which some guilty men escape punishment." One of those "legal loopholes" would seem to be the requirement of unanimity of a verdict in a criminal case. For comments thereon, see WILLIAMS, *op. cit. supra* note 11, at 278-79. Another may be the rule settled in most American jurisdictions that the state has no right to appeal from an acquittal. For an interesting criticism of this general rule, see Kronenberg, *Right of a State To Appeal in Criminal Cases*, 49 J. CRIM. L., C. & P.S. 473-82 (1957/1958).

14. The pros and cons of the rules of evidence and similar technical rules are thus concisely stated by an English author: "Being largely 'judge-made' law, they have come down from time immemorial, and belong to the mumbo-jumbo of the legal profession, adding quite unnecessarily to the expense and delay of modern litigation. On the other hand, they set up a standard of proof higher than that demanded in the courts of any other country [*sic*]. Thus they constitute a vital protection of the liberty of the subject." JOYCE, *JUSTICE AT WORK* 57 (1957). For an American expert's summary of changes and proposals for change in the rules about hearsay, see MCCORMICK, *EVIDENCE* 626-34 (1954). One of the present day leading teachers of criminal law in England writes: "A discretion to exclude remote and insubstantial evidence is necessary for any tribunal. But opinion is hardening that the technical English rules of hearsay, which may have the effect of excluding evidence of the greatest persuasiveness, are neither necessary nor easily workable." WILLIAMS, *op. cit. supra* note 11, at 177. Finally, see the argument for reform of the exclusionary rules of evidence in MORGAN, *SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION* (1956).

which, it is believed, should be changed is the practice in this country that a charge of murder may be reduced to manslaughter in consideration of a manslaughter confession of the suspect. This may result in an untrue manslaughter confession of one suspected of murder, who, however, is not guilty at all of the homicide charged. This actually happened in the recent California case of John Tennessee Fry,<sup>15</sup> which created quite some sensation when it was reported in the daily press. Even this instance shows, as could be illustrated by other instances, that if our system of administering criminal justice is in need of improvement, as it certainly is, its present defects do not always work in favor of a defendant, but that some of them present a danger to an accused who is innocent.<sup>16</sup>

It is an undeniable fact that the judicial net, however closely knit, cannot exclude the possibility that one guilty of murder will escape final conviction, that the best police system cannot identify quite a few murderers and cannot catch numerous others, that even the fact that a crime has been committed is not always brought to light, and that, in the words and according to the fictional plot of a famous mystery writer, some deliberate homicides are "quite untouchable by the law."<sup>17</sup> This is certainly not ideal, or even satisfactory. It is, however, one of those symptoms of human frailty that must be taken into account with equanimity rather than highlighted in an alarming way with a tendency to discredit the rules of our law designed to prevent convictions of innocents or of those not

15. Fry was, on August 5, 1958, arrested under suspicion of having murdered his common-law wife, Elvira Hay, whose nude body had been found in a bath tub. He claimed to be innocent. However, pursuant to a stipulation between the public prosecutor and his defense counsel he pleaded guilty of manslaughter when arraigned, on November 19, 1958, in the Superior Court of San Francisco, file number 55112, and was accordingly sentenced. But on June 4, 1959, one Richard Thomas Cooper confessed that he had committed the homicide of which Fry had been convicted according to his own, but untrue confession. After having innocently served about 6 months in the California State prison, Fry was released as the result of a pardon, granted by the State Governor on June 16, 1959. The foregoing is partly based on news items in the San Francisco Chronicle, of August 5, 1958, June 5, 1959, and later dates, and partly on information in letters addressed to the writer and received through the courtesy of Mr. Thomas C. Lynch, District Attorney of the County of San Francisco, and Mr. Cecil F. Poole, pardon secretary of the Governor of California.

16. From this point of view questionable is the rule, in some American jurisdictions, that the right to trial on the issue of guilt or innocence may be waived by a plea of guilty, which is in legal effect tantamount to a conviction, and leaves only the question of punishment to be decided. See *People v. Goldstein*, 32 Cal. 432 (1867); *People v. Hickman*, 204 Cal. 470, 268 Pac. 909 (1928); *People v. Roberts*, 211 Mich. 187, 178 N.W. 690 (1920); *State v. Best*, 44 Wyo. 383, 12 P.2d 1110 (1932). For interesting cases of untrue guilty confessions, and conflicting guilty confessions of two persons, see LUSTGARTEN, *THE WOMAN IN THE CASE* 11 (1956); PHILLIPS, *MURDERER'S MOON* 171 (1956); WILLIAMS, *op. cit. supra* note 11, at 180. The comment of WILLIAMS, *op. cit. supra* note 11, at 180, that "experience shows the danger of supposing that a confession, even if satisfactorily proved, is necessarily true," can hardly be challenged by anybody familiar with the history of famous criminal cases. See also the chapter on "Untrue Confessions" in MUENSTERBERG, *ON THE WITNESS STAND* (1949).

17. CHRISTIE, *AND THEN THERE WERE NONE* 175 (1959).

proved guilty. While Mr. Seagle's book must be read with caution in so far as his propositions are concerned, it is well worth reading because of the interesting judicial curiosities to which he refers and the artistic manner in which he treats his subject.

MAXIMILIAN KOESSLER\*

**COST JUSTIFICATION.** By Herbert F. Taggart. Ann Arbor, Mich.: Bureau of Business Research, School of Business Administration, University of Michigan, 1959. Pp. xvii, 588. \$12.50.

This book is the valuable product of a fine scholar writing about a subject to which he has obviously devoted many productive years of study and research. Mr. Herbert F. Taggart is a CPA and professor of accounting at the University of Michigan. He was formerly chairman of the Advisory Committee on Cost Justification under the Robinson-Patman Act.<sup>1</sup>

In order that Mr. Taggart's book may be viewed in the proper perspective, it will be helpful to review briefly the history and objectives of the Robinson-Patman Act, which, enacted in 1936, was an amendment of section 2 of the Clayton Act<sup>2</sup> of 1914. The principal purpose of section 2 of the original Clayton Act was to prohibit geographical price discrimination which was destructive of competition among sellers. It was meant to prevent a monopolistic seller from charging widely divergent prices in different geographical areas for the purpose of driving out competition and reaping the benefits of a monopoly where predatory trade practices had succeeded in eliminating competition.

The emergence of large, integrated buyers such as chain stores and mail-order houses with a resultant disruption in the traditional distribution channels threatened the existence of the wholesaler and the small retailer. An investigation of chain stores by the Federal Trade Commission disclosed that the integrated buyer's mass buying power enabled him to coerce price concessions from his suppliers, thereby creating a competitive advantage. This was brought out forcefully in Mr. Justice Douglas' dissent in *Automatic Canteen Co. of America v. FTC*.<sup>3</sup> The Robinson-Patman Act was enacted to prevent this cut-throat trade practice and to foster the ability of the "independents" to survive.

Section 2 of the Robinson-Patman Act<sup>4</sup> makes it unlawful for a seller engaged in interstate commerce to discriminate in price between different purchasers of commodities of like grade or quality where the effect of such discrimination is, or may be, to substantially lessen competition in any line of commerce, or to injure competition among buyers or sellers.

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1. 15 U.S.C. §§ 13-13(c).
2. 15 U.S.C. §§ 12-27.
3. 346 U.S. 61 (1953).
4. 15 U.S.C. § 13(a).



The Robinson-Patman Act exempts from its prohibitions:

1. Price changes to dispose of seasonal and obsolescent goods;
2. Price changes made in good faith to meet the equally low price of a competitor;
3. Price differences which make "only due allowances for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are . . . sold or delivered."<sup>5</sup>

Mr. Taggart's book is concerned with number 3 above, cost defense, wherein the seller attempts to justify his price differences by presenting evidence to show that his cost differences equal or exceed his price differences.

In his book, the author has made an extremely detailed study of all of the cases in which the seller has attempted to justify his pricing policy by introducing evidence about his costs. He has taken some twenty recorded cases (including Goodyear, Standard Brands, Champion Spark Plug, Standard Oil (Indiana), Sylvania, and U. S. Rubber Co.) in which the seller has pleaded the cost-justification defense and has gone behind the printed opinions to the original pleadings, transcripts, exhibits, and other documents which were introduced into evidence. He has, in short, dissected the cost analyses presented by the various respondents, schedule by schedule, item by item, with particular emphasis upon the methods employed (for example time studies, invoice counts, etc.) in obtaining the information from which the schedules were prepared and the basis used to allocate indirect costs.

This book is divided into twenty-one chapters. In each of the first fifteen, the author, as previously mentioned, describes the major cases before the Federal Trade Commission in which the respondent has attempted to cost justify his prices; the next four chapters are a study of minor commission cases, treble damage suits and suits instituted against buyers for knowingly receiving price concessions; the last two chapters present the author's conclusions and his evaluation of cost justification as a defense.

The thoroughness of the author's study is illustrated by the organization of the chapters which deal with major cost-justification cases. The complaint is discussed and the price discriminations alleged are enumerated. The nature of the seller's business and his methods of operation are described to give the reader the background necessary to understand the cost analysis. The seller's cost analysis is then presented step by step. Next the commission's evaluation and criticism of the seller's cost justification is presented. Finally, the reader is given the commissioner's order and subsequent proceedings, if any. Fortunately the author gives his opinion of the methods used by various sellers in analyzing their costs and draws comparisons between the handling of the same item by different sellers.

The two final chapters in which the author presents his conclusions and evaluation of the cost-justification defense make interesting reading. One conclusion will be somewhat disconcerting to an attorney who may have supreme confidence

in the efficacy of precedents. Mr. Taggart concludes that it is extremely difficult to derive from the cases any set of cost accounting principles or procedures which can be depended upon to satisfy the requirements of the Commission. Reasons for the unreliability of precedents, the author tells us, are two:

1. Infinite variations in business organizations, methods of doing business, and market conditions make each case just enough different from any other to be distinguished from the others;
2. Because of the infrequency of litigated cases in which the cost justification proviso has been raised and the constant changes which take place in the Commission's accounting staff, the accountants who study the seller's cost analysis are sometimes inexperienced and simply deny the existence of a precedent.

A striking illustration of the latter occurred in the *Sylvania* case in which the attorneys for the respondent attempted to rely quite heavily on precedent. The Commission's accounting witness when on the witness stand could remember only six of the twelve important cost-justification cases which had preceded *Sylvania*.

Other conclusions reached by the author may be summarized as follows:

1. In a cost analysis the differential cost approach may not be used to justify price differences. In other words, each sale must be charged with its proportionate share of the cost of each business function from which it receives benefit even though that cost is not increased as a result of that particular sale.
2. In a cost analysis it is not necessary to distinguish between fixed and variable costs, and each may be assigned to functions without discrimination.
3. In a cost analysis, the allocation of indirect costs to sales on the basis of sales dollars (the bootstrap method) is not acceptable if that basis is used simply because it is simple and convenient. For instance, the author says: "A customer who pays only 90 cents as compared to another customer's dollar will be charged with only 9 cents of cost for which the other customer is charged 10. The reason for the 1-cent difference in cost is the 10-cent difference in price. It is not reasonable to permit the very price difference complained of to give rise to part of its own cost justification."
4. The seller's regular books of account will rarely, if ever, provide all the information needed to make an acceptable cost analysis. (As a result, the cost studies of all of the litigated cases have been "after the fact" and each has been made for the express purpose of defending against a complaint alleging price discrimination.) As a corollary, the classifications and analyses used in the seller's regular accounting system are not binding on him for Robinson-Patman purposes.
5. Substantial elements of indirect costs may not be allocated on the basis of the estimates of management.
6. Time is the most practical basis for allocating salaries and expenses of salesmen. In most cases, this will necessitate the making of a time study showing the time of sales people devoted to customer groups, specific commodities, etc. The author suggests that the use of samples may be employed to reduce the expense of a time study. However, while the use of sampling is acceptable, the cost analyst must be prepared to establish that the sample used is truly representative.
7. Because the seller's cost analysis will be studied and evaluated by the

Commission's accounting staff, the analysis should be prepared by accountants using accounting methods and terminology.

Mr. Taggart concludes in the last paragraph of the book that the cost defense is the most practical one available to a seller whose pricing policies are questioned under the Robinson-Patman Act. Many have disagreed with him. Cost defense was described as "largely illusory in practice" by the Attorney General's committee to study the antitrust laws. Mr. Edward F. Howrey, a former Chairman of the Federal Trade Commission, is in agreement. In the *Automatic Canteen Co.* case, the Supreme Court observed the "intricacies inherent" in the cost defense and the "elusiveness of cost data" and questioned whether any one *really* knows whether a price has cost justification. Mr. Taggart freely admits that only 22 sellers have pleaded the cost defense to Robinson-Patman complaints and that this is not due to the paucity of complaints. But he maintains that the real reason more sellers have not relied upon the cost defense may well be the conviction that the requisite cost savings do not exist. He is probably correct.

Mr. Taggart points out that the cost defense has been most successful in informal proceedings where sellers have been able to convince the Commission that no complaint should be issued. In how many of these proceedings has the seller been able to cost-justify his prices? How difficult has this been? These questions cannot, of course, be answered because these proceedings are confidential and not published. The author suggests that the Commission publish a study of these informal proceedings, preserving the necessary anonymity of the sellers.

If the undersigned has gotten anything from Mr. Taggart's book, it is the conviction that a successful cost-justification defense calls for considerable imagination, research and study by qualified attorneys and accountants working together and that the successful cases (including cases where complaints have not issued) have by and large been due to such cooperation.

It is also apparent that Mr. Taggart's book is a must for all accountants and lawyers attempting to prepare a cost study for Robinson-Patman purposes. While the attorney will not be expected to direct the detailed work of the cost analysis, he should be conversant with cost justification principles so that his counsel will be of assistance in setting the basic pattern of the cost study and so that he may detect, in advance of trial, methods which unquestionably will be unacceptable to the Commission.

He will be the one who must present the cost defense before the Commission, or before the court, and who must convince the tribunal of the inherent reasonableness of the cost study. He will not be able to do this unless he is aware of the methods used in the cost study, such as the basis used to allocate indirect costs and why one method was chosen rather than another. He will be unable to offer wise counsel unless he has, at least, some working knowledge of the fundamental principles and methods of distribution cost accounting and an understanding of previous Robinson-Patman cost accounting cases. This book will give him the requisite information.

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